SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 362

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

WILLIAM MURPHY,
Appellant,

v.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR., for failure to obey a Subpoena,

JOHN MOODY, SR.,
Appellant,

v.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

On Appeal from the Supreme Court of the State of New Jersey

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of the State of New Jersey

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Supreme Court of New Jersey, filed May 22, 1961, affirming a judgment of the Superior Court of New Jersey—Law Division, Hudson County, made June 20, 1960, which adjudged the appellants guilty of civil contempt and ordered that they be fined and committed to imprisonment.

The convictions of civil contempt arose in a proceeding instituted by the Waterfront Commission of New York Harbor in the Superior Court of New Jersey—Law Division, Hudson County, to punish the appellants Murphy and Moody, who are labor union officials, for declining, at a hearing before the Commission, to answer certain questions relating to a longshoremen's union work stoppage. The appellants have not yet paid their fines or been committed to imprisonment under the judgment of conviction.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are properly presented.

Opinions Below

The opinion of the Supreme Court of New Jersey (App. A, *infra*, p. 1a) is reported, 35 N. J. 62, 171 A. 2d 295. The oral opinion of the Superior Court of New Jersey—Law Division, Hudson County (App. A, *infra*, p. 15a) is not reported.

Jurisdiction

(1) The proceedings instituted in the Superior Court of New Jersey—Law Division by the appellee Waterfront Commission to punish the appellants for contempt were brought upon allegations by the Commission that the appellants were punishable under Section 1 of Article XIV of

Part I of the Waterfront Commission Act (N.J.S.A. 32:23-62) for failure to testify before the Commission, and that the Commission's authority to subpoena the appellants for the giving of testimony rested upon Sections 8, 11, and 13 of Article IV of Part I (N.J.S.A. 32:23-10) and Section 5-a (4) of Part III (N.J.S.A. 32:23-85) of said Act. The appellants unsuccessfully contended in the courts below that the appellee Commission's assertion of jurisdiction over the subject matter of the attempted interrogation of the appellants was in conflict with federal law (29 U. S. C. A. §§157, 158 and related provisions). The authority of the Superior Court of New Jersey—Law Division to entertain the contempt proceedings was invoked by the appellee Commission under R.R. 4:46-5 (c), a New Jersey Rule of Court which has the force of a statute for such purpose.

(2) The date of the judgment of the Supreme Court of New Jersey sought to be reviewed is May 22, 1961 (App. A, p. 30a, *infra*). The judgment of the Superior Court of New Jersey (June 20, 1960) which was affirmed by the judgment sought to be reviewed is printed in App. A, *infra*, p. 31a. Notice of appeal to this Court was filed with the clerk of the Court possessed of the record (the Superior Court of New Jersey—Law Division) on June 30, 1961.

(3) The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (2).

(4) Cases believed to sustain the jurisdiction are *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, and *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, holding that a proper case for appeal is presented where the validity of a state statute, as construed and applied, is drawn in question on the ground of repugnancy to the Constitution or laws of the United States; and, more particularly, *LaCrosse Tel. Corp.* v. *Wisconsin Board*, 336 U. S. 18, 21-24, involving the validity, on federal-repugnancy grounds, of an order of a state board pursuant to a state labor statute.

(5) The appeal involves the validity of portions of the New Jersey legislation relating to the Waterfront Commission of New York Harbor, a bi-state body established under an interstate compact (N. J. Stats. L. 1953, c. 202, p. 1511 *et seq.*, as amended—see codification in N.J.S.A. 32:23-1 *et seq.*).[1] Specifically involved is the validity, as here construed and applied, of the New Jersey provisions conferring on the Commission subpoena powers and other investigative powers (N.J.S.A. 32:23-10, pars. 8, 11; N.J.S.A. 32:23-85 (4)), and providing for punishment of witnesses, when duly subpoenaed to attend, for failure to testify or produce other evidence before the Commission (N.J.S.A. 32:23-62). The text of said New Jersey provisions is (with citations of the respective New York counterpart provisions):

> *N.J.S.A.* 32:23-10 (8, 11) [*McKinney's Uncol. Laws*, §§6700 *dd* (8, 11)]:
>
> "In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:
>
> • • •
>
> "8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;
>
> • • •
>
> "11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all mat-

[1] The New York counterpart legislation is N. Y. Laws 1953, cc. 882, 883, as amended—see McKinney's Unconsolidated Laws, §§6700 aa et seq. The consent of Congress to the compact was given by the Act of August 13, 1953, c. 407, 67 Stat. 541.

ters relating to the accomplishment of the objective of this compact;"

N.J.S.A. 32:23-62 [*McKinney's Unconsol. Laws*, §6700 *nn* (1)]:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending."

N.J.S.A. 32:23-85 (4) [*McKinney's Unconsol. Laws*, §6700 *tt*-1]:

" 'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act."

All of the above-quoted provisions except the last (defining "witness") are from the bi-state compact as consented to by Congress in 1953 (see fn. 1, p. 3, *supra*). The above-quoted provision defining "witness" is a supplementary bi-state enactment, not consented to by Congress, but adopted seemingly pursuant to §1 of "Article XVI" of the original compact (N.J.S.A. 32:23-70; McKinney's Unconsol. Laws §6700 pp. (1)).[2] The validity of the above-quoted provisions, as here construed and applied, is challenged in this appeal on the ground of repugnancy to Article VI of the Federal Constitution in that such construc-

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[2] §1 of Article XVI reads:

"Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the legislature of either state concurred in by the legislature of the other."

tion and application confirmed the appellee Commission, a state body whose powers derive from state legislation,[3] in an assertion of jurisdiction and power which by federal law are pre-emptively vested in a federal agency, the National Labor Relations Board (29 U. S. C. A. §§141(b), 142(2), 151, 152(3)(5)(8)(9), 153(d), 157, 158(b)(1)(A), 158(b)(2), 158(b)(4)(ii)(A, B, C, D), 158(b)(7), 158(e), 160(a), 163, 164(c)).[4] Other provisions of the Waterfront Commission legislation of New Jersey, and the New Jersey Rule of Court under which the appellee Commission instituted the within contempt proceedings (R.R. 4:46-5 (c)), the validity of which is not directly in issue herein but which are pertinent to the issues presented, are cited and discussed *infra* and are quoted in App. B, *infra*, pp. 33a *et seq.*, p. 45a.

Questions Presented

1. Do the pre-emptive effects of 29 U. S. C. A. §§157, 158 and of related provisions of the Labor-Management Relations Act operate upon the subject matter of this case so as to deprive the Waterfront Commission of New York Harbor of the jurisdiction and authority asserted by it in its subpoenas addressed to the appellants, in its interrogation of the appellants, and in its contempt proceedings against the appellants in the Courts of New Jersey? If so, is the state Waterfront Commission legislation involved, as construed and applied to sustain the Commission's investigatory jurisdiction, repugnant to Article VI of the Federal Constitution?

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[3] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 109-110, holds that an interstate compact consented to by Congress is not a "law of the United States." *Rivoli Trucking Corp.* v. *American Export Lines*, 167 F. Supp. 937, 939 (E. D. N. Y. 1958) applies *Hinderlider* to the instant compact. *Bolger* v. *United States*, 189 F. Supp. 237, 256 (S. D. N. Y. 1960) holds that the instant Commission is a state body.

[4] The cited provisions of 29 U.S.C.A. are printed in App. B, *infra*, pp. 37a *et seq.*

2. Is the federal pre-emption rendered ineffective or less effective by the Waterfront Commission's assertions, made for the first time in the contempt proceedings in the state courts—i.e., never asserted in the Commission hearing where appellants declined to answer questions and never otherwise made known by the Commission to the appellants prior to the court proceedings—that the purpose of the Commission's interrogation of the appellants was not merely to investigate a work stoppage by longshoremen but to ascertain whether the stoppage was designed to inhibit effective operation of the bi-state statutory port-watchman system established to prevent waterfront crime?

3. On the record of this case, would the answer to question 2, above, be different if it were assumed, *arguendo*, that the appellants received, prior to the court contempt proceedings herein, adequate notice and apprisal of the Commission's purported purpose to investigate waterfront security matters and not merely a labor dispute or a strike?

4. Is this case governed by the rulings and holdings of *DeVeau* v. *Braisted*, 363 U. S. 144?

5. Does the congressional consent to the interstate compact here involved negate or diminish the federal pre-emptive effects referred to above?

6. Is the Commission's assertion of jurisdiction and authority over the appellants incompatible with the express reservation of "the right to strike" in the bi-state legislation to which Congress here consented (N.J.S.A. 32:23-68)?

7. Were the appellants denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the judgment of conviction of civil contempt and by the affirmance of said judgment, in view of their lack of notice and apprisal of the asserted investigative purpose of the Commission as recited in questions 2 and 3, above.

Statement of the Case

On or about May 18, 1960 the appellants were subpoenaed by the appellee Commission to appear before it as witnesses to testify on a subject matter which was described in the subpoenas merely as "an investigation being conducted pursuant to Article IV[5] of the Waterfront Commission Compact" (D12a).[6] Both appellants appeared in response to the subpoenas on May 19, 1960 (D13a, D32a). Appellant Moody, who is an organizer for the International Longshoreman's Association in New Jersey (D7a), testified first (D26a, line 19; D44a, line 27). Repeated demands by appellant Moody to be informed of the "purpose" of the investigation, and objections that such purpose was not adequately made known (D14a, line 23; D17a, lines 11, 39; D19a, line 16; D20a, line 23), were answered by the Commission's representatives with only the statement (or variants thereof) that the Commission was investigating a "work stoppage" at Piers "A", "B" and "C" of the American Export Lines in Hoboken, New Jersey, and with questions concerning that "work stoppage" (D14a, line 28; D15a, line 23; D18a, lines 13, 20; D19a, lines 10, 37; D20a, lines 17, 35; D21a, lines 21, 29, 32; D22a, line 5)—*all* of the Commission's essential questions to appellant Moody being addressed to the subject of

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[5] The only pertinent "Article IV" provision, as the event showed (*infra*), was N.J.S.A. 32:23-10 (11), quoted p. 4, *supra*, which is a "catch-all" provision for "investigations".

[6] "D——a" refers to the printed "Appendix to Brief For Appellants" in the Superior Court of New Jersey, Appellate Division, which served also as such "Appendix" in the Supreme Court of New Jersey. Nine extra copies of said Appendix (which is part of the Record in this Court) are filed herewith. Said Appendix prints all of the pertinent pleadings and papers, including the subpoena, relating to Appellant Moody, but omits some of those items relating to Appellant Murphy as being duplicative of identical Moody items. The Record in this Court is, of course, complete in these respects.

that "work stoppage" and Moody's knowledge about it (*ibid*). At only two places in the interrogation did the Commission's representatives go beyond their merely general references to the aforementioned "work stoppage", i.e., once they referred generally to the Commission's statutory functions but refused even to specify which of those functions the Commission had in mind in interrogating Moody (D16a-17a, D17a-18a), and once they stated in mere general terms that the Commission wanted to know whether the work stoppage involved "any violations of the Compact" (D22a). On advice of his counsel that in view of the Commission's failure to specify its purpose otherwise than as just described, the Commission lacked jurisdiction in this "labor and management" matter (D15a, lines 1 to 17, 27 to 33; D18a, lines 24 to 35; D20a, lines 8 to 11; D23a, lines 34 to 37) or "labor dispute" (as the Commission's own representative phrased it) (D15a, line 26),[7] appellant Moody refused to answer any questions about the work stoppage (D14a-26a). All of Moody's objections were overruled by the Commission and he was directed to answer (D15a, line 34; D16a, line 6; D17a, lines 14, 35; D18a, lines 11, 18, 37; D19a, lines 1, 21; D20a, lines 12, 27; D21a, lines 1, 16, 38; D22a, line 12; D23a, line 38; D24a, line 15; D26a, line 10).

Minutes after appellant Moody left the Commission's witness stand, appellant Murphy, Business Agent of Local 2 of the I.L.A. (D30a), took the stand (D31a *et seq.*). The Commission's statement of "purpose", its questions, the witness' objections and the directions to answer followed substantially the same pattern as in Moody's ques-

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[7] Appellant Moody's attorney also expressly explained to the Commission's representatives some of the details of the then pending "labor-management" dispute (involving issues under a collective bargaining agreement and a threat of civil suit by management against the union) between the I.L.A. and the American Export Lines (D15a, D16a, D18a, D25a to D26a).

tioning (D32a-44a). Once again the "purpose" was stated in the general form above noted, viz., "to determine whether there are any violations of the Waterfront Commission Compact in the pending work stoppage" (D33a, lines 5 to 8), "to determine the true nature of this work stoppage" (D33a, line 19; D34a, line 28), "to see whether it's a labor dispute or whether there's violations of both the criminal law[8] or the compact" (D34a, lines 29 to 31). Apart from the latter general reference to "criminal law" (see last preceding footnote), the single additional fact-area that came up in the interrogation of Murphy as distinct from Moody, was introduced *via questions* by the Commission's representatives (i.e., not by way of a *statement* of Commission "purpose"), namely, questions as to whether the work stoppage was related to the appointment of one Markley as an employee of American Export Lines (D40a, line 13) or was "to compel" "discharge, or to limit the duties" of Markley (D44a, line 22). Murphy declined to answer these questions or any others relating to the work stoppage, except a few preliminary questions, on the ground of lack of jurisdiction in the Commission in that it was making no "accusations" (D33a, line 11) of "anything wrong at this point" (D34a, lines 35 to 40), and was merely investigating to see whether it could find jurisdiction ("looking for jurisdiction"—D36a, line 12) in what was not shown to be anything but a "labor dispute" within the exclusive jurisdiction of the N.L.R.B. (D33a-36a, D40a-41a, D42a-43a). The Commission's counsel conceded that "I don't know if there is anything wrong at this point" (D34a, line 38), and that "we may not have jurisdiction ultimately, if the facts show it's just a labor dispute" (D35a, line 37), but "we have the jurisdiction to find out

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[8] Note this unelaborated reference to "criminal law"—the only "express" reference to that topic in the interrogation of either of the appellants.

what the facts are" (D35a, line 39 to D36a) and *"this Commission has the power to conduct an investigation regardless of the authority or jurisdiction of the National Labor Relations Board if it effects [sic] the Compact"* (D35a, lines 9 to 12).

The above professions by the Commission of lack of any information as to "anything wrong" in the work stoppage which it was investigating occurred in the late afternoon of May 19, 1960 (see D31a; D44a, line 27). Nevertheless, on the succeeding day the Commission was ready with motion papers to hold Moody and Murphy in contempt on the basis—for the first time—of detailed averments that the work stoppage was for a specified object which the Commission claimed it had jurisdiction to investigate (D1a-12a). The Commission's now at-last-announced theory, i.e., newly announced in said motion papers, was that the work stoppage was directed against American Export Lines' hiring of a new Chief Security Officer, James Markley (a former employee of the Commission)—which had been implied in the questioning of appellant Murphy (D40a; D44a)—and for that reason the work stoppage was aimed at impairing the "port watchmen" or security-officer system established under the Compact to combat crime on the waterfront (D3a-7a). This last (and crucial) feature, as to an allegedly specific *criminal* object, thus made its first appearance in the case in the motion papers, i.e., after the allegedly contemptuous testimony had already been concluded. The Commission in its motion papers averred that it

> "• • • has information that this work stoppage is a concerted effort to keep James J. Markley off the piers of the American Export Lines in Hoboken, New Jersey. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion of an employer (the American Export Lines) to com-

pel such employer to limit the functions of, or to discharge a licensed port watchman (James H. Markley) and to further determine whether any persons registered or licensed by the Waterfront Commission are participating in such illegal coercion, the Commission instituted the instant investigation." (D6a-7a)

The Commission's motions for contempt citations were brought in the Superior Court of New Jersey—Law Division (D1a). The appellants filed affidavits putting into issue the Commission's claim of jurisdiction to conduct the investigation of the work stoppage as being a matter within the pre-emptive jurisdiction of the National Labor Relations Board (D26a, D28a-30a). The contempt issues were submitted on the pleadings and affidavits. The trial court in its oral opinion (App. A, p. 15a, *infra*) did not refer to the issue of the Commission's failure to state adequately the jurisdictional "purpose" of the interrogation at the time when the Commission was questioning the appellants; and it held that the Commission had jurisdiction notwithstanding the federal Labor-Management Relations Act, because the Commission's investigative powers were sufficiently broad to allow it to probe whether the work stoppage was aimed at impairing the port watchmen system. The appellants were convicted of civil contempt, as earlier recited (D27a; App. A, p. 31a, *infra*).

The appellants appealed to the Superior Court of New Jersey, Appellate Division (D45a). While the case was pending in the latter Court, the Supreme Court of New Jersey certified the appeal of its own motion (App. A, p. 2a, *infra*). In affirming the judgment of conviction the Supreme Court of New Jersey appears to have reasoned (as had the trial court) on the assumption that the Commission's jurisdictional "purpose" was adequately shown on the record through the medium of the Commission's averments *in its motion papers in the contempt proceed-*

ings that it had information indicating the work stoppage to be a threat to the port-security system for prevention of crime on the waterfront (App. A, p. 3a, *infra*). This assumption—which overlooked the fact that the Commission's aforesaid supposed "apprisals" of jurisdictional "purpose" or "pertinency" were not made to the appellant-witnesses during their actual interrogation and were never imported into the record until *after* the alleged contempts had already been committed—appears to have been an indispensable decisional step in bringing the court below to the conclusion that the Waterfront Commission's statutory investigative powers as exercised in this case did not conflict with the pre-emptive jurisdiction of the National Labor Relations Board. For, on the impetus of that assumption as it were, the Court below treated it as seemingly self-evidently established that the work stoppage here involved was *ipso facto* within the investigative competency of the Commission as being aimed against the very *raison d'etre* of the Commission, prevention of waterfront crime and racketeering. The work stoppage being thus viewed, the decisive question became (in the reasoning of the Court below): "Would Congress regard a Commission investigation of a strike designed to limit the effectiveness of the port-watchmen system as incompatible or in conflict with federal regulation of labor relations?" (App. A, p. 6a, *infra*). This question was answered in the negative on the authority of *DeVeau* v. *Braisted*, 363 U. S. 144, i.e., on the basis that our case is governed by the *DeVeau* ruling that the crime-prevention purposes of the Congressionally-consented-to Waterfront Commission Compact negated, in that case, incompatibility with a Congressional purpose of pre-emptive jurisdiction under the L.M.R.A. (App. A, pp. 7a-9a; 14a-15a, *infra*). The opinion below formulates the Commission's powers to conduct investigations for the vindication of the port watchman system in terms which evidently would give a kind of *prima*

facie ascendancy to the interests of that system over the interests of the N.L.R.B. pre-emptive jurisdiction in *any* labor strike situation, i.e., the Court below spoke of the Commission's "power to investigate *any activity* which *reasonably appears* designed to inhibit the effectiveness of the port security system," "*activities* which *appear detrimental* to that system", "a *strike* which *appears* designed adversely to *affect*" that system (App. A, pp. 13a-15a, *infra*); and it held in light of all of the foregoing, "* * * *it is unnecessary for us to decide whether the strike by defendant's union arguably falls within the protections or proscriptions of the LMRA*" (App. A, p. 6a, *infra*) (all of above italics supplied).

How the Federal Questions Are Presented

The question of federal pre-emptive authority was raised, as seen, in the proceedings before the Waterfront Commission by objections of counsel referring expressly to the pendency of the work stoppage and the labor dispute from which it derived as presenting a matter within the competency of the N.L.R.B., and challenging the Commission's jurisdiction on that basis and on the basis of the Commission's failure to go beyond its merely generalized assertions of grounds for state jurisdiction or "purpose" under the Compact (see pp. 8-10, *supra*, where we show also that the Commission overruled all of said objections). As also seen, the defense affidavits in the contempt proceedings in the Superior Court—Law Division, put in issue the points as to federal pre-emption, and as to inadequate showing of state jurisdictional "purpose" during the Commission's interrogation of the appellants (pp. 11-12, *supra*). In addition, the brief for appellant Murphy in the contempt trial proceedings expressly argued the latter point, citing *Scull* v. *Virginia*, 359 U. S. 344 and *Watkins* v. *United States*, 354 U. S. 178 (Answering Brief on Behalf of Defendant, William Murphy, pp. 11-14); and the briefs for both

appellants in said trial extensively argued (*passim*) the pre-emption issues (these briefs have been designated by appellants in their joint Notice of Appeal for inclusion in the Record before this Court). The trial court, as noted (App. A, *infra*, pp. 15a *et seq.*), did not refer to the issue of inadequate statement of "purpose", convicting the defendants notwithstanding the explicit presence of that issue in the case, and ruling against them on the pre-emption issue.

In the Supreme Court of New Jersey, it is evident from the opinion (App. A, p. 1a, *infra*), that the pre-emption issues were expressly raised and were decided against the appellants. See also question No. 2 of the "Statement of Questions Involved" in the "Brief for Appellants, William Murphy and John Moody, Sr." in the court below (the brief is captioned in the "Superior Court of New Jersey—Appellate Division—it is designated as a part of the Record in this appeal); said question No. 2 reads:

> "2. Does the Commission have jurisdiction, power or authority to investigate an alleged unfair labor practice? If the provisions of the Act permit such investigation, are not these provisions unconstitutional under the Supremacy Clause of the United States Constitution as conflicting with the Labor Management Relations Act of 1947 (Taft-Hartley Act)?"

The above question was argued in Points II and III of the cited brief (pp. 6-13). The point as to the Commission's failure to express adequately its jurisdictional "purpose" during the interrogation of the appellant-witnesses was before the Court below *per* the printed "Appendix" (pertinent pages whereof are cited at pp. 8-10, *supra*); the point was not briefed by appellants in the Court below but it was orally argued for them by Robert Wall, Esq.; we do not anticipate that the latter assertion will be disputed, but if it should be, we shall move for leave to file an affidavit by

Mr. Wall. The Court below, as noted, did not expressly rule on the issue of inadequate statement of jurisdictional purpose but assumptively decided it, necessarily, in favor of the appellee Commission (App. A, *infra*, p. 1a).

If the foregoing should be deemed insufficient to show proper presentation of the federal question as to apprisal of "purpose" or "pertinency", we respectfully invoke the rules as to *de novo* consideration of "jurisdictional facts" (and of "constitutional facts") which we discuss at pp. 24 *et seq., infra.*

The Questions Are Substantial

1. The state court decision here sought to be reviewed projects a significant new inroad by state police power against the portion of the federal commerce power which Congress has exercised in the Labor-Management Relations Act (29 U.S.C.A. 141 *et seq.*). The court below comes to this result by a simplistic reading of *DeVeau* v. *Braisted*, 363 U. S. 144. Whatever may be said by critics of the *DeVeau* decision, at least its defenders may properly contend that *DeVeau* did not irretrievably blur, as does the decision below, the line that separates the Waterfront Commission's powers to deal with *crime*, from the federal Labor Board's power to deal with labor-management relations affecting commerce. *DeVeau* did not necessarily fatally endanger this dividing line, because the limited "criminal" subject-matter of the Commission's regulation in that case, i.e., the handling of union funds by convicted felons, does not touch pervasively the day-to-day course of the country's labor-management relations as a whole. A judicial finding of Congressional intent to let the federal pre-emptive authority over labor-management relations give way to the state power over crime in so restricted and readily definable a sector as was presented in *DeVeau* is one thing. The Court below, however, has found, on the ostensible authority of *DeVeau*, a congres-

sional intent to abdicate the federal purview in labor-management areas of seemingly illimitable extent. For, whereas the "crime prevention" theme of *DeVeau* touched (and only in the narrowest way) solely the matter of selection of union officers, the decision below in our case applies that "crime prevention" theme in a way which touches all the myriad forms of happenings that may arise in non-amicable labor-management relations, every form of active-or-passive conduct by aggrieved or dissatisfied labor unions or employees—in short, the entire range of labor-management troubles envisaged by the term "labor dispute". We say that the decision below has this sweep because it declares, virtually in so many words, that *any apparent threat*, posed by *any labor union conduct* (i.e., not only by strikes or other work stoppages), against the state-declared anti-crime policy of the Compact, abrogates *pro tanto* the National Labor Relations Board's pre-emptive powers. "It is unnecessary" even, the Court below has said, "to decide whether the strike arguably falls within the protections or proscriptions of the LMRA" (App. A, p. 6a, *infra*). It is only "necessary", it seems, for the Commission to believe, in regard to "any activity" (*id.* p. 13a), that such activity "appears" somehow inimical to whichever particular port watchman set-up of the Commission happens to be operative at any particular juncture or locale. In any such port watchman situation, then, or (so far as appears) in any other kind of situation within the extensive ambit of the Commission's regulatory powers, let there but be heard an official state outcry against waterfront "crime", and the whole carefully-built-up federal machinery for regulating labor-management relations becomes "unnecessary". "Unnecessary" too, whenever the bogey of "crime" is thus fetishistically invoked, becomes all inquiry as to *why* a particular union or local may actually be discontented with a particular incidence of the port-watchman system or of other Commission regulations. This last suggestion is not hypothetical. In this very case, with its utter lack of

any record *proof* (as contrasted with the Commission's conclusory averments which, even so, were not spread upon the record until after the "contempts" had already occurred) of any improper-boding union conduct, or even intentions, regarding the port-watchmen system, and where therefore the work stoppage which is said to have denoted opposition to the new Chief Security Officer (Markley) cannot be said *in itself to* have denoted *improper* opposition to the security *system* or even to the individual officer, the commission has nevertheless been sustained by the court below in its demand for the jailing of two labor union officials for contempt on the sterile and utterly speculative hearing "record" above described. For all that appears in the record (and we have shown how willing the appellants were to elicit from the quite unwilling Commission a more meaningful "record"), the object of the work stoppage could have been to rally legitimate union sentiment among the membership in the face of the arrival on the scene of an authentic *bête noire* (Markley) who gravely imperilled legitimate union solidarity and security. On this wholly plausible and permissible assumption, the case would plainly have been one for N.L.R.B. pre-emption. Or, if the thus assumed object of the work stoppage (i.e., as having in fact been aimed at Markley *personally*) be said to have constituted an "unfair labor practice" by the union, N.L.R.B. pre-emption would likewise have attached. Not so, however under the doctrine of the decision below, which crowds out all such questions of "arguable" federal pre-emption (*San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236) because it allows room only for a pre-emptive *state* power.[9]

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[9] Since the court below expressly laid aside as "unnecessary" all issues as to whether N.L.R.B. pre-emption would apply to the case in the absence of the Waterfront Commission legislation, we shall limit our further showing on the "arguability" point to the following: (1) Since it would be illegal under the Compact (N.J.S.A. 32:23-41, quoted in App. B, *infra*, p. 34a) for a port watchman to be a member

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of appellants' union, the work stoppage here involved, if viewed as motivated by Markley's non-membership in said union, would be an "unfair labor practice" under the L.M.R.A. both as an improperly union-coerced discrimination (e.g., *N.L.R.B.*, v. *International Brotherhood of Teamsters, Etc., Local* 182, 228 F. 2d 83 (C. A. 2, 1955); *N.L.R.B.* v. *Local* 803, *Etc.*, 218 F. 2d 299 (C. A. 3, 1955)), and as a demand for ilelgal contract rights (cf., e.g., *Davis* v. *Silverberg*, 14 Misc. 2d 744, 155 N. Y. S. 2d 321 (S. Ct. 1956); *International Typographical Union, Etc.*, 123 N.L.R.B. 806 (1959); *Local Union No. 1, Etc.*, 119 N.L.R.B. 1466 (1958)). (2) The assumedly coercive motivation of the work stoppage, i.e., coercively aimed against Markley's employment, is "arguably" an "unfair labor practice" under the L.M.R.A. in light of the undefined and broad ambit of federally redressible union-coerced employment-discrimination as evolved in cases such as [a] *Gimbel Brothers, Inc.* 100 N.L.R.B. 870 (1952) (forcing discharge of employee who had long been deemed offensive by union leadership for reasons not related to conventional union interests); [b] *Radio Officers' Union, Etc.* v. *N.L.R.B.*, 347 U. S. 17 (broadened formulation of test of unlawful encouragement of union membership by discriminatory practices); cases following the *Radio Officers'* case are, e.g., *N.L.R.B.* v. *Local* 542, *Etc.*, 255 F. 2d 703 (C. A. 3, 1958); *N. L. R. B.* v. *Brotherhood of Painters, Etc.*, 242 F. 2d 477 (C. A. 10, 1957); *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937 (C. A. 3, 1954); and cf., *re* the rule of the *Radio Officers'* case, e.g., *N.L.R.B.* v. *Imparato Stevedoring Corp.*, 250 F. 2d 297 (C. A. 3, 1957); *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581 (C. A. 9, 1954); *Baider* v. *Local* 470, *International Teamsters, Etc.*, 400 Pa. 188, 161 A. 2d 343, 346 (1960). (3) Further as to Markley's ineligibility for membership in appellant's union, cf. the cases cited in C.C.H. Labor Law Reporter, Labor Relations Vol's., ¶4135, par's. .0702, .109, .1092, .1095. (4) Cf. also *N.L.R.B.* v *Local* 743, Etc., 202 F 2d 516 (C. A. 9, 1953) (unfair labor practice by union under 29 U.S.C.A. 158 (b)(1)(A) and 158 (b)(2) to demand that non-union employees be chosen from a union-approved referral list). (5) Since the Compact allows port watchmen to be members of a separate union (N.J.S.A. 32:23-41, quoted in App. B, *infra*, p. 34a), cf. the cases holding it to be an "unfair labor practice" by a union under the L.M.R.A. to coerce

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The decision sought to be reviewed exerts too abrupt an impact—too abrupt to be ignored by this Court, we respectfully submit—on the "process of tentative, fragmentary illumination" which this Court has been carrying out so painstakingly in its efforts at emendation of the "Delphic" Congressional intent in this branch of federal-state relations over the past decade and more. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 241-242.

However, we emphasize the sheer *expansiveness* of the decision below, more than its abruptness—expansion of the state police power at the expense of the federal commerce power. Rarely, and then only in cases of the most unequivocally expressed Congressional intent, does the judiciary essay so dramatic an alteration of the balance of federal-state power in an area of prime national concern. It seems unthinkable that such an alteration should be judicially effected through "construction" of a Congres-

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discrimination against an employee in connection with such separate (or dual) union membership, e.g., *N.L.R.B.* v. *Local* 169 *Etc.*, 228 F. 2d 425 (C. A. 3, 1955); *N.L.R.B.* v. *Wagner Iron Works, Etc.*, 220 F. 2d 126 (C. A. 7, 1955), cert. den. 350 U. S. 981; *Local* 791, *Etc.*, 115 N.L.R.B. 1004 (1956); *Rupp Equipment Co.*, 112 N.L.R.B. 1315 (1955). (6) If the work stoppage is assumedly viewed as aimed at affecting Markley's work *assignment*, see 29 U.S.C.A. 158 (b)(4)(D) (quoted in App. B, pp. 41a-42a, *infra*) and cf., e.g., *McLeod* v. *Drivers and Chauffeurs Local Union No.* 816, 178 F. Supp. 288 (S. D. N. Y. 1959), aff'd 277 F. 2d 800 (C. A. 2, 1960); C.C.H. Labor Law Reporter, Labor Relations Vol's, ¶4135, par's. .0855, 128. (7) Viewing Markley's port-watchmen functions as being wholly distinct, under the system established by the Compact (N.J.S.A. 32:23-39 *et seq.*), from "employment" of other employed personnel in whom appellants' union could lawfully be interested from the standpoint of labor-management relations, the assumed coercion aimed at Markley would "arguably" be an "unfair labor practice" under 29 U.S.C.A. §158(e) (quoted in App. B, *infra*, p. 43a) as an attempt to cause the employer "to cease doing business with any other person".

sional intent which is so ambiguous (at best) as that here involved—an intent, moreover, which is expressed through the merely tangential medium of consent to an interstate compact.

Yet, it should perhaps occasion no surprise that this kind of expansive thrust should occur under the instant state legislation. The Waterfront Commission's legislative draftsmen have known well how to go about "supplementing" the original Compact which Congress approved in 1953 and has not post-audited since then. The provision in the original Compact allowing such supplementary legislation (N.J.S.A. 32:23-70) (quoted in FN. 2, p. 5, *supra*) which this Court noted in *DeVeau* (363 U. S. at 150-151), has borne remarkable progeny which this Court has not hitherto had occasion to examine. We refer especially to the sweeping post-1953 enlargements of the Commission's powers of investigation and punishment;[10] although perhaps more notable still is the astonishing change in the definition of the word "compact" itself to give to the "supplementary" provisions, adopted without Congressional post-consent, the aura of the original "compact" provisions (N.J.S.A. 32:23-85(7), quoted in App. B, p. 33a, *infra*).

The expansive process of which we speak, then, in connection with this legislation, is one that "grows by what it feeds on", and, inevitably, leads ever on to "increase of appetite"—scarcely a process that invites encouragement at the cost of that federal power which fuels the beneficient social machinery of the L.M.R.A.

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[10] E.g., the change in the definition of "witness" to render such persons subject to the Commission's rigorous procedures in any type of inquisitional activity desired by the Commission (N.J.S.A. 32:23-85, quoted at p. 5, *supra*); the new immunity provisions (N.J.S.A. 32:23-86(5), quoted in App. B, *infra*, p. 36a); and the sweeping new penalty provisions (N.J.S.A. 32:23-88, 89, 90 quoted in App. B, *infra*, pp. 36a-37a).

Nor, forsooth, is the Waterfront Commission itself excluded from opportunity for prompt and effective succour by that same federal power in any necessary and proper case where the Commission's seemingly absolutist aspirations to fight "crime" may have to adjust to the pre-emptive jurisdiction of the N.L.R.B. The Compact expressly authorizes the Commission to advise and consult plenarily with "public officials and agencies * * * upon all matters which the Commission may desire" (N.J.S.A. 32:23-10(12) (App. B, p. 33a, *infra*). And even apart from such express authority, in the same way as may, e.g., municipal bodies,[11] railroads,[12] and public utilities,[13] so the Commission too, in aid of waterfront employers desiring the Commission's protection, may (no reason to the contrary appearing) invoke in appropriate cases the pre-emptive procedures of the L.M.R.A.; or, of course, such employers may themselves directly invoke those procedures.

Also not to be lost sight of, in the entire perspective raised by the broadside impact of the decision below, are the express provisions of the Compact reserving the various conventional rights of union labor, including the right to strike (N.J.S.A. 32:23-68, 69, quoted in App. B, p. 35a, *infra*), provisions for which little effective scope remains, under the decision below, whenever the Commission chooses to invoke the virtually untrammelled right, under that decision, to cry "crime".

The question here presented, as to the constitutionality of the Compact as construed and applied in the decision below, is substantial, then, in the most weighty degree. The

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[11] Cf. *Plumber's Local* 298 v. *County of Door*, 359 U. S. 354.

[12] Cf. *Teamsters Local* 25 v. *N.Y.N.H. & H.R.R. Co.*, 350 U. S. 155.

[13] Cf. *Street, Electric R'way & Motor Coach Employees, etc.* v. *W.E.R.B.*, 340 U. S. 383.

question is not governed by the *DeVeau* case, as above shown, for here there is not brought into play, either factually or analytically, the direct crime-prevention features which were decisive in *DeVeau;* here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a "crime" element. Moreover, the question appears to be one of first instance, not only in this Court (*DeVeau* being inapposite, as seen), but in all courts. Neither the "pre-emption" cases cited by the court below (App. A, pp. 14a-15a, *infra*), nor the additional ones we have found,[14] reach the pre-emptive issue in the way posed by this case, i.e., with the whole range of labor-management relations being engulfed by the "crime prevention" theme, and with the "crime prevention" aspect not even being convincingly shown to be importantly involved on the record in any event. Indeed, in the one case we have found where allegations were made which did arguably point to the existence of both a labor dispute and claimed rights or disabilities under the Waterfront Commission Compact, it was seemingly held that N.L.R.B. pre-emption applied. *Cuff* v. *Ryan Stevedoring Co.*, 142 N.Y.S. 2d 57 (S. Ct. 1955).

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[14] Similar to the *DeVeau* case are *Local* 824, *Etc.* v. *Waterfront Commission*, 16 Misc. 2d 481, 182 N. Y. S. 2d 481 (S. Ct. 1958), aff'd 7 A. D. 2d 630, app. dismissed 6 N. Y. 2d 861, cert. den. 361 U. S. 835; *Application of Gleason*, 14 Misc. 2d 900, 182 N. Y. S. 2d 485 (S. Ct. 1958), aff'd 8 A. D. 2d 799; and *International Longshoremen's Ass'n* v. *Hogan*, 156 N. Y. S. 2d 512 (S. Ct. 1956). Involving undisputed or conclusively proven facts of outright defiance to official acts or policies of the Waterfront Commission, are *Waterfront Commission* v. *International Longshoremen's Ass'n.*, 144 N. Y. S. 2d 674 (S. Ct. 1955); *New York Shipping Assn.* v. *International Longshoremen's Assn.*, 144 N. Y. S. 2d 469 (S. Ct. 1955); and *Waterfront Commission* v. *International Longshoremen's Ass'n.*, 130 N. Y. S. 2d 862 (S. Ct. 1954).

2. In support of the due process contention raised in No. 7 of our "Questions Presented" herein (p. 6, *supra*), i.e., relating to the appellee Commission's failure (and *refusal*) to state adequately the jurisdictional purpose of the interrogation of appellants, we rely on (1) *Deutch* v. *United States*, —— U. S. ——, 81 S. Ct. 1587, 1593; *Watkins* v. *United States*, 354 U. S. 178; and *Scull* v. *Commonwealth of Virginia*, 359 U. S. 344, holding that such apprisal of "purpose" or showing of "pertinency" is required by due process—see also *Annotation*, 3 L. Ed. 2d 1671-1675; and (2) the principle that, such apprisal being a requisite to *jurisdiction of the subject matter* (which is here integral also with issues of "constitutional fact", i.e., facts pertaining to the due process infringement arising from the lack of apprisal), the issue may be raised at any time and may be considered factually *de novo* by this Court. *Matson Nav. Co.* v. *United States*, 284 U. S. 352, 359 (lack of jurisdiction of subject matter reviewable at any stage); *Estep* v. *United States*, 327 U. S. 114, 119, 125 (inviolability of right to judicial review of issues of jurisdictional-constitutional fact even in Selective Service induction cases); *Kern-Limerick Co.* v. *Scurlock*, 347 U. S. 110, 121 (independent review by Supreme Court of issues of fact or construction *re* federal constitutional rights); *Feiner* v. *New York*, 340 U. S. 315, 316 (same); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (same); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 473-475 (review of administrative determinations of jurisdiction of subject matter); *Addison* v. *Holly Hill Fruit Producers*, 322 U. S. 607, reh. den. 323 U. S. 809 (same); *Cox* v. *United States*, 157 F. 2d 787 (C. C. A. 10, 1946), aff'd. 322 U. S. 442, reh. den. 333 U. S. 830 (same); *Haefle* v. *Davis*, 373 Pa. 34, 95 A. 2d 195, 198 (1953) (jurisdictional issues *re* N.L.R.B. pre-emption may be raised at any time); and the state court decisions cited in C.C.H. Labor Law Reporter, Labor Relations Vol's., ¶5505, par. .185 (violation of a pre-emptively *void* injunction is not contempt).

CONCLUSION

It is respectfully submitted that the federal questions herein, being properly presented and substantial, entitle the appellants to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(2).

Appellants respectfully pray that, if this matter be deemed inappropriate for review by appeal, the Court may treat the papers as a petition for a writ of *certiorari*.

Respectfully submitted,

HAROLD KRIEGER,
Attorney for Appellants.

ROBERT WALL,
Of Counsel.

[APPENDICES FOLLOW]

Appendix A to Jurisdictional Statement (Opinions and Judgments Below)

Opinion of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-78 September Term 1960.

IN THE MATTER

OF

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

IN THE MATTER

OF

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR. for failure to obey a Subpoena.

Argued April 11, 1961

Decided May 22, 1961

Mr. Robert Wall argued the cause for the Appellant, William Murphy.

Mr. Samuel L. Marciano argued the cause for the Appellant, John Moody, Sr. (Messrs. Florio, Dunn, Marciano & Lypinski, Attorneys; Mr. Samuel L. Marciano, on the Brief.)

Appendix A to Jurisdictional Statement
(Opinions and Judgments Below)

Mr. Robert A. Pin argued the cause for the Respondent, Waterfront Commission of New York Harbor. (Mr. William P. Sirignano, of the New York Bar, General Counsel; Mr. Irving Malchman, of the New York Bar, Assistant to General Counsel.)

The opinion of the court was delivered by
PROCTOR, J.

This case turns on whether the Waterfront Commission of New York Harbor has jurisdiction to investigate a work stoppage by longshoremen, when the Commissioners have reason to believe that the stoppage was designed to inhibit effective operation of the port watchman system. The dedendants, John Moody, Sr. and William Murphy—officials of the striking union—appeal from a judgment of the Superior Court, Law Division, ordering that they be incarcerated until they are willing to answer certain questions addressed to them by the Commission during the course of its investigation. Each was also fined $50. We certified the appeal before argument in the Appellate Division.

The events leading up to the judgment from which defendants appeal are as follows: One James H. Markley was an investigator for the Commission, assigned principally to cover the piers and terminal of the American Export Lines in Hoboken. On or about May 16, 1960, Markley left the employ of the Waterfront Commission in order to work for American Export as a security officer. To fulfill his security functions, Markley obtained a license from the Commission permitting him to operate as a port watchman. On May16, 1960, the day Markley was to commence work for American Export, the longshoremen and checkers employed by American Export in Hoboken did not report for work. With the exception of the morning

of May 17, the work stoppage continued until May 25. The striking employees were members of Hoboken Local #2 of the International Longshoremen's Association (ILA). Defendant Moody is an organizer for the ILA in New Jersey; and defendant Murphy is business agent for Local #2.

The Waterfront Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, it instituted an investigation to determine whether any persons registered or licensed by the Commission were violating the Waterfront Commission Act (N.J.S.A. 32:23-1 *et seq.*) by coercing an employer to limit the functions of, or discharge a licensed port watchman. In connection with the investigation, the Commission served subpoenas ordering the defendants to appear and testify. When defendants appeared, they were informed of the above-described purposes of the investigation. They were also informed that the Commission was proceeding under its statutory authority to make investigations and collect and compile information concerning waterfront practices generally, and all matters relating to the accomplishment of the objectives of the Act. The defendants were also told that the Commission was "asking questions to determine the true nature of this work stoppage, to see whether it's a labor dispute or whether there's violation of both the criminal law or the * * * [Waterfront Commission Act]."

Defendant Moody gave his name and address, testified that he was a union official, and refused to answer any other questions. Defendant Murphy testified that he was business agent of Local #2 and represented members of the Local working at the American Export facilities in Hoboken. He stated that he knew the longshoremen did not work on May 16, 1960, and that it was common knowl-

edge for the ten days preceding May 16 that things were not normal at the American Export piers. Murphy refused to say whether the abnormal conditions were related to the employment of Markley as port watchman, and he refused to answer any other questions. Neither defendant asserted his privilege against self-incrimination; but each stated, *inter alia*, as a reason for his refusal to answer that the Commission did not have jurisdiction to conduct the investigation.[1] The Commission interrogator overruled the defendants' objections to the questions, directed them to answer, and informed them that continued recalcitrance would subject them to "contempt proceedings." Defendants persisted in their refusal; and subsequently the Law Division, pursuant to a motion by the Commission, and after a hearing, rendered the judgment which imposed a fine upon the defendants and directed their incarceration.

Defendants urge reversal of the judgment below on the ground that, even assuming the purpose of the work stoppage was to subvert the port watchman system, the Commission does not have jurisdiction to investigate it. They argue (1) that the investigation adversely affects or limits "the right to strike" which is expressly reserved by the Waterfront Commission Act (*N.J.S.A.* 32:23-68); and (2) that the Commission's power to investigate is in conflict with and therefore pre-empted by the Labor Management Relations Act (LMRA) (29 U.S.C.A. § 141 *et seq.*). Defendants' first argument is encompassed by their pre-emption argument. Article XV, section 1, par. 1 of the Waterfront Commission Act provides:

> "* * * nothing contained in this compact shall be construed to limit in any way the right of employees to strike." *N.J.S.A.* 32:23-68.

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[1] Defendants' other stated reasons for their refusals to answer are not related to the grounds for reversal urged on this appeal.

Assuming, *arguendo*, that investigation and the concomitant power to punish recalcitrant witnesses is in itself regulation, the effect of this statutory provision upon the Commission's power to investigate necessarily depends upon what is meant by the "right to strike." Like most rights, that right is not absolute. A strike is not immune under all conditions from any form of governmental regulation. The Waterfront Act does not purport to define the dimensions of the right to strike. It therefore merely declares a rule of interpretation which prevents any use of the Act to qualify or impede whatever right exists under New Jersey or Federal law. *Cf International Union* v. *Wisconsin Empl. Rel. Bd.*, 336 U. S. 245, 259, 93 L. Ed. 651, 665 (1948) (interpreting § 163 of the LMRA, which provides that "Nothing in this subchapter * * * shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." 29 U.S.C.A. §163.) We do not know of any New Jersey law which prevents state investigation of a strike intended to inhibit effective functioning of a security system. If that right exists, it must come from federal law. The applicable federal law is the LMRA and its amendments. By the "right to strike," therefore, defendants must mean that under the federal statute the alleged union activity is either immune from limitation or subject to limitation only by the federal government. So viewed, the argument is that because the work stoppage falls within the purview of the LMRA, the National Labor Relations Board has exclusive primary jurisdiction to deal with it. This is the same as defendants' pre-emption argument and shall be discussed together therewith.

Defendants' pre-emption argument goes as follows: The power to investigate is the power to regulate. A state may regulate union activity only when the activity is clearly

not protected by § 7 or prohibited by § 8 of the LMRA. 29 U.S.C.A. §§ 157, 158. Otherwise stated, if union activity is arguably protected or prohibited by the federal legislation, the National Labor Relations Board has exclusive primary jurisdiction to deal with it. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775 (1959). The Waterfront Commission states that the purpose of its investigation is to determine whether defendants' union struck to cause an employer (American Export) to discriminate against one of is employees (Markley). Defendants contend that such a strike is an unfair labor practice under section 8(b)(2) of the LMRA (29 U.S.C.A. § 158(b)(2)). Accordingly, the Waterfront Commission has no primary jurisdiction to investigate it.

For reasons subsequently to be discussed, it is unnecessary for us to decide whether the strike by defendants' union arguably fails within the protections or proscriptions of the LMRA. The constitutional doctrine of preemption—the exclusion of state power over a particular matter because it is the subject of comprehensive federal regulation—is designed to implement congressional purpose. See *De Veau* v. *Braisted*, 363 U. S. 144, 153, 4 L. Ed. 2d 1109, 1116 (1960); *Garner* v. *Teamsters, C. & H. Union*, 346 U. S. 485, 488, 98 L. Ed. 228, 238 (1953). If by its regulation of a particular activity Congress has exhibited a purpose which is incompatible with the exercise of state power over the same activity, the state power must give way. *San Diego Bldg. Trades Council* v. *Garmon, supra*; *Garner* v. *Teamsters, C. & H. Union, supra.* The applicability of the doctrine to the present case therefore depends upon an answer to the question: Would Congress regard a Commission investigation of a strike designed to limit the effectiveness of the port-watchman system as incompatible or in conflict with federal regulation of labor relations?

Appendix A to Jurisdictional Statement
(Opinions and Judgments Below)

The answer to the above question turns on the nature of the Waterfront Commission Act. Our Act is a counterpart of one contemporaneously adopted by New York. L. 1953, cc. 202, 203, (*N.J.S.A.* 32:23-1 *et seq.*; N. Y. Laws 1953, cc. 882, 883, *McKinney's Unconsolidated Laws*, §§ 6700aa *et seq.* It has three parts. Part *I* (*N.J.S.A.* 32:23-1 to 73) is a compact of sixteen articles entered into by the two states with the consent of Congress (67 Stat. 541, Act of Aug. 12, 1953, c. 407) as required by Article *I*, section 10 of the Federal Constitution. This part establishes the Waterfront Commission as a bi-state agency, sets forth the purposes of the legislation, and gives to the Commission certain powers essential to fulfillment of those purposes. Part *II* (*N.J.S.A.* 32:23-74 to 77.3) primarily concerns the financial administration of the Commission and its programs. And Part *III* (*N.J.S.A.* 32:23-78 to 108) contains provisions supplementing and implementing the compact of Part *I*.

A recent United States Supreme Court case relies on congressional approval of the bi-state Compact to show that the congressional purpose manifested in federal labor legislation is not incompatible with the exercise of a state power asserted under the Waterfront Act. *De Veau* v. *Braisted*, 368 U. S. 144, 4 L. Ed. 2d 1109 (1960). At issue in *De Veau* was the validity of a provision in Part III of the New York Act (New Jersey's Act has a similar provision) which prohibits a waterfront union from collecting dues if any officer of the union has been convicted of a felony and has not been pardoned or given a certificate of good conduct by the parole Board. *McKinney's Unconsolidated Laws* § 6700-ww; (*N.J.S.A.* 32:23-80). The plaintiff, a local union official who had been convicted of grand larceny, was suspended from office because the defendant district attorney threatened to prosecute any per-

son collecting dues for the local so long as the plaintiff remained an officer. The plaintiff sought to have the statutory provision declared unconstitutional and its operation enjoined. His primary argument was that the disputed section of the Waterfront Act was in conflict with and therefore pre-empted by the LMRA, specifically sections 1 and 7 thereof. 29 U.S.C.A. §§ 151, 157. Section 1 of the LMRA declares a congressional purpose to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C.A. § 151. Section 7 grants employees "the right • • • to bargain collectively through representatives of their own choosing." 29 U.S.C.A. § 157. The plaintiff argued that pre-emption resulted from the fact that the employees' right to select representatives of their own choosing guaranteed by the LMRA was interfered with or limited by the Waterfront Act provision disabling them from collecting dues if they select a convicted felon as a representative.

The court rejected the pre-emption argument on the ground that "in light of the purpose, scope and background of • • • [the Waterfront Commission Act] and Congress' relation to it, • • • an inference of incompatibility has no foundation." 363 U. S. at 153, 4 L. Ed. 2d at 1116. It noted that the Waterfront Act was passed primarily to eliminate criminal domination of waterfront labor; that its passage followed extensive study of waterfront conditions by New York, New Jersey and Congress; and that Congress concurred in the states' conclusion that statutory measures to control waterfront labor practices were essential to eliminate the then prevaling crime-infested conditions. The court reasoned that by approving the

bi-state Compact and thus endorsing its goals, Congress manifested an intent not to pre-empt regulation of union officials by the Waterfront Commission.[2]

The principle of *De Veau*—that congressional approval of the bi-state Compact indicates the inapplicability of the pre-emption doctrine to a state power derived from the Waterfront Act—applies with even more force to the case before us. For in *De Veau* the disputed section of the Waterfront Act was not part of the Compact expressly consented to by Congress.[3] An examination of the history and structure of the Waterfront Act shows that the power here asserted by the state is not only essential to fulfillment of the statutory objectives but is accorded by the Compact which Congress approved.

As previously noted, submission of the Compact to Congress was preceded by extensive studies, undertaken by the states and Congress, of conditions on the New York-New Jersey waterfront. For a discussion of these studies, see *Hazelton* v. *Murray*, 21 N. J. 115 (1956) and state and congressional reports cited therein.

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[2] The plaintiff in *De Veau* also argued that pre-emption derived from a provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 401 *et seq.*, which imposed less restrictive limitations on union officers than the Waterfront Act. The court rejected that argument on the ground that when Congress meant pre-emption to flow from the 1959 Act, it expressly so provided.

[3] As previously noted, the disputed section was contained in Part *III*. Parts *II* and *III* were not part of the Compact. The Supreme Court reasoned, however, that since Congress was aware of the provisions in Part *III* when it approved Part *I*, and since Part *III* was essential to implementation of Part *I*, congressional approval extended to the disputed section.

Appendix A to Jurisdictional Statement
(Opinions and Judgments Below)

The legislative reports all indicate that the Act was passed to eliminate racketeering and other evils on the New York-New Jersey waterfront. One evil of specific concern was the domination of the Port Watchmen's union by the ILA. Criminal elements in control of the ILA were thus able to neutralize the effectiveness of the security system, and commit crimes without fear of disclosure. "Through their power as union officials, they [criminal leaders of the ILA] place their confederates in key positions on the docks • • • and carry on such activities as pilferage, loansharking and gambling." *Fourth Report, N. Y. State Crime Comission, N. Y. State Leg. Doc. No. 70,* pp. 23-24 (1953). The extent and effect of former ILA control over watchmen is illustrated by the following excerpts from pages 57, 59, and 63 of the New York report adopted by the New Jersey Law Enforcement Council (*Report of the New Jersey Law Enforcement Council,* p. 3, June 19, 1953.):

"Prior to the Taft-Hartley Act (1947) the Port Watchmen's Union, Local 1456, which represented the New York port watchmen, was an ILA local dominated and controlled by Joseph P. Ryan, John J. (Ike) Gannon, Charles P. Spencer, and their associates. Since the port watchmen were supposed to stop thievery, loansharking, gambling and extortion, and to preserve the peace, they could hardly expect—and did not receive—any support from the officials of the ILA or of its locals.

• • •

"The close connection of the watchmen's union with the ILA has resulted in watchmen being reprimanded by their union leaders for reporting a longshoreman for

stealing. This situation was developed in the testimony of C. Gulizia, a port watchman (3168-3169);

Q. And did you have occasion during that time to pick up a longshoreman for stealing cargo on that pier? A. Right, sir.

• • •

Q. Turned the man in? To whom? A. To the superintendent, of course. The man, I hear, got four days suspension. The man went to the union and complained about it.

Q. And he came back to work? A. Well, he didn't come back. Maybe he went to another pier.

Q. But he got a four-day suspension? A. As far as I was told.

Q. He wasn't prosecuted criminally, so far as you know? A. Never.

Q. He wasn't sentenced to jail for larceny, anything of that kind? A. Never. None of them were sent to jail.

• • •

Q. And what did Gannon say about it? A. Well, he says, 'That isn't the right way to do things,' and he says, Gannon says, 'If you were to get four days' suspension, how would you like it?'

Q. You mean the president of the Watchmen's Union? A. That's right.

Q. Told you it wasn't right to turn in a man you'd seen actually stealing cargo on the pier? A. That's right. That's right.

The port watchman, next to the rank-and-file longshoreman, is the most tragic figure on the piers.

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Appendix A to Jurisdictional Statement
(Opinions and Judgments Below)

"When some steamship companies have attempted to increase the effectiveness of their security service they have been met with objections on the part of ILA officials and forced to give up the project. An example was given by F. M. Rohrer of the Grace Line. Rohrer explained what happened when he tried to hire Vincent Tierney to head the Grace Line port police (371):

Q. Did you then tell Mr. Tierney that you had to clear the hiring of Mr. Tierney to replace Mr. English with Gene Sampson, the delegate of 791, and Jay O'Connor, the delegate of 791, and others? A. I don't know as it was mentioned by name, but I probably did tell him that it had to be cleared through the union.

Q. That the hiring of the head watchman had to be cleared— A. (interposing) With the union delegates.

Q. ILA union delegates? A. That's right.

Q. Not the watchmen's delegates? A. No.

"Tierney was then employed to make a security study on the piers operated by the Grace Line, but even this met with violent union opposition. In fact, Tierney, an ex-policeman, testified that he had been threatened with death (3889)."

To combat the above-enumerated and other evils, the Compact (the part of the Act approved by Congress) grants to the Waterfront Commission authority to license or register waterfront workers and to regulate hiring practices. Of particular significance to the present case is the fact that the Compact requires port watchmen to be licensed by the Commission (*N.J.S.A.* 32:23-39) and establishes as a condition for receiving and holding a license that a watchman not be a member of a union which represents longshoremen. *N.J.S.A.* 32:23-41(d) and 44 (a). To

make effective the provisions of the Act, the Compact grants the Commision the powers, among others, (1) "*to make investigations,* collect and compile information *concerning* waterfront practices generally within the port of New York district and upon *all matters relating to the accomplishment of the objectives of this compact.*" *N.J.S.A.* 32:23-10(11) [Emphasis added]; (2) "to administer oaths *and issue subpoenas throughout both States to compel the attendance of witnesses and the giving of testimony* and the production of other evidence." *N.J.S.A.* 32:23-10(8) [Emphasis added]; and (3) "to make annual and other reports to the Governors and Legislatures of both States containing recommendations for the improvement of the conditions of waterfront labor * * * for the alleviation of the evils described * * * and for the effectuation of the purposes of this compact." *N.J.S.A.* 32:23-10(13). *N.J.S.A.* 32:23-62, also contained in the Compact approved by Congress, provides that failure of any witness when duly subpoenaed to attend or give testimony shall be punishable by the Superior Court, Law Division, in New Jersey, and the Supreme Court in New York in the same manner as such failure is punishable by those courts in a case pending therein. See *In re Application of Waterfront Com.*, 32 N. J. 323, 332 (1960).

It is clear from a reading of the legislative reports which preceded passage of the Waterfront Act and a reading of the Compact itself that the creation and maintenance of an independent port watchman system was regarded by both the States and Congress as essential to the creation and preservation of a crime-free waterfront. It is equally clear that power to investigate any activity which reasonably appears designed to inhibit the effectiveness of the port security system is essential to the maintenance of the watchman's independence and thus to the

fulfillment of the ultimate statutory goal. We can think of no sensible reason why Congress would expressly approve the States' effort to rid the waterfront of crime by creating, among other things, an independent watchman system, and yet pre-empt and thus bar application of the expressly granted power to investigate activities which appear detrimental to accomplishment of that goal. *Cf. De Veau* v. *Braisted, supra*, 363 U. S. at 153, 4 L. Ed. 2d 1109 at 1116.

Applying the principle of *De Veau* to the case before us, we find that by its express approval of the bi-state Compact Congress indicated that exercise of the Commission's investigatory power over a strike which appears designed adversely to affect the port security system does not conflict with the policies and goals of federal labor legislation and that therefore the States' power is not pre-empted by the LMRA.[4] We note that our conclusion is consistent with all other cases we know of in which some provision of the Waterfront Act was alleged to have been pre-empted by federal legislation. In each case the Act survived the pre-emption attack. *Staten Island Loaders* v. *Waterfront Commission*, 117 F. Supp. 308 (S. D. N. Y. 1953) *aff'd* 347 U. S. 439, 98 L. Ed. 826 (1954); *Linehan* v. *Waterfront Commission of New York Harbor*, 116 F. Supp. 683 (S. D. N. Y. 1953), *aff'd* 347 U. S. 439, 98 L. Ed. 826 (1954); *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2d Cir. 1960); *Bradley* v. *Waterfront Com'n of New York Harbor*, 130 F. Supp. 303 (S. D. N. Y. 1955); *O'Rourke* v. *Waterfront Commission*, 118 F. Supp. 236 (S.

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[4] The defendants do not urge a conflict between the Commission's power to investigate this strike and any provision of the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C.A. § 401 *et seq.*

D. N. Y. 1954); *Applegate* v. *Waterfront Com'n of New York Harbor*, 184 F. Supp. 33 (S. D. N. Y. 1960); *Hazelton* v. *Murray, supra.*

We hold that the Commission may investigate a waterfront work stoppage when the Commissioners have reason to believe that the stoppage is designed to inhibit effective operation of the Act. The Commission is entitled to know all of the facts surrounding such a stoppage so that it may intelligently determine whether persons registered or licensed by the Commission have violated any provision of the Act and so that it may fulfill its statutory duty of recommending to the state governments measures for the improvement of the conditions on the New York-New Jersey waterfront.

Accordingly, the judgment of the Superior Court, Law Division, is affirmed.

Opinion of Superior Court of New Jersey, Law Division

Jersey City, N. J.,
June 17, 1960.

Before:

HON. JOSEPH L. SMITH, *J. S. C.*

Appearances:

For the Waterfront Commission of New York Harbor:
ROBERT A. PIN, ESQ.

For William Murphy:
ROBERT H. WALL, ESQ.

For John Moody, Sr.:
LAWRENCE E. FLORIO, ESQ.

The Court: Today is the return day of an Order to Show Cause requiring William Murphy and John Moody,

Sr. to show cause before this Court why they should not be punished for contempt of court, pursuant to R. R. 4:46-5 (c).

The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the Port of New York, including Hoboken. The employment of the said James H. Markley commenced May 16, 1960. Prior the commencement of his employment with American Export Lines, he was an investigator for the Waterfront Commission and his principle assignment was to cover said piers and terminal of American Export Lines, Inc., in Hoboken.

On Monday, May 16, 1960, when the employment of James H. Markley for American Exports Lines commenced, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage continued except for the morning of Tuesday, May 17, 1960, until Monday, May 23, 1960, when it ceased at 8 A.M., and the Court has been informed the men have been back to work continously up to the present time.

Under the Waterfront Commission Act, the longeshoremen and checkers who were participating in this work stoppage are required to be and are registered by the said Commission. Also, under the said Waterfront Commission Act, James H. Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Waterfront Commission as a port watchman.

The Waterfront Commission alleges it has information that this work stoppage was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion

of an employer (American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and to further determine whether any person registered or licensed by the Waterfront Commission were participating in such illegal coercion, the Commission instituted the instant investigation. The foregoing is the purpose of the said investigation, as stated by the Commission.

In connection with such investigation, subpoenas of the Waterfront Commission, returnable forthwith, were duly served on May 18, 1960, on William Murphy, the business agent of Local number 2 of the ILA, representing longshoremen in Hoboken, New Jersey, and upon John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Waterfront Commission in response to these subpoenas on the afternoon of May 19, 1960 (the duly adjourned return date of said subpoenas). Both Murphy and Moody, after answering certain various preliminary questions, refused to answer the following questions asked them pursuant to the aforesaid subpoenas.

Mr. John Moody, Sr., refused to answer the following questions:

"Q. Are you an official of any ILA local?"

"Q. Mr. Moody, will you tell us what local you are an official of?"

"Q. Mr. Moody, what position do you hold with the local of the ILA that you are affiliated with?"

"Q. All right, Mr. Moody, would you tell us when you first received news of any labor trouble on Piers 'A,' 'B' and 'C' in Hoboken?"

"Q. Mr. Moody, within the last week have you attended any conferences with the officials of the American Export

Line with respect to the work stoppage at Piers 'A,' 'B' and 'C' in Hoboken?"

"Q. Have you had any conversation with Captain Andrews, Leland Andrews, of American Export Line with respect to the stoppage this week at Piers 'A,' 'B' and 'C' in Hoboken, New Jersey? When I say this week, I mean from May 16th to the present.

"Q. Mr. Moody, have you had any discussions or conversations with Captain Blackledge of the American Export Lines concerning the refusal to work at Piers 'A,' 'B' and 'C' of longshoremen in that particular—on those particular piers this week?"

"Q. Have you had any conversations with Michael McNamara, Senior Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B and C that have occurred since May 1, 1960, to the present?"

"Q. Mr. Moody, have you at any time, either prior to the work stoppage which commenced on May 16th, 1960 or before that time or after that time, did you at any time issue orders for a work stoppage at Piers A, B, and C?"

"Q. Did you, before May 16th ever give any orders for the commencement of a work stoppage at Piers A, B, and C?"

"Q. Have you since May 16, in other words, May 16, May 17, May 18, and May 19, have you on these particular days issued any instructions concerning work stoppages, any instructions, now both either commencing or ceasing the stoppages at Piers A, B, and C, Hoboken?"

"Q. Have you had any conversations with anyone since May 16, 1960 to the present concerning the work stoppages at Piers A, B, and C?"

"Q. What is your function with the local in Hoboken?"

"Q. What is your position with the union?"

"Q. Mr. Moody, were you present at Piers A, B and C, Hoboken, on Monday of this week?"

"Q. Were you at the piers on Tuesday?"

Mr. William Murphy refused to answer the following questions:

"Q. Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?"

"Q. Did you, in any way, participate in this work stoppage to compel the American Export Line to discharge, or to limit the duties of our employee by the name of James Markley?"

Mr. Murphy refused to give any further testimony.

Mr. Moody and Mr. Murphy based their refusals to testify on the following grounds:

1. The work stoppage is a matter which the Commission has no statutory authority to investigate.

2. The work stoppage is a matter over which the National Labor Relations Board has exclusive jurisdiction.

3. The Commission has no right to investigate the work stoppage since civil litigation may ensue as a result thereof.

(The American Export Lines has threatened to sue the ILA.)

4. The Commission's investigation seeks to inquire into privileged communications between union and management and/or between union representatives.

By way of answering statement and affidavit, Mr. William Murphy states:

1. He is Business Agent for Local 2 of the International Longshoremen's Association.

2. He has never been convicted of a crime and in spite of his being acquitted of a charge, the Waterfront Commission of the Port of New York arbitrarily denied him the right to work on the waterfront.

3. There exists a contract between the American Export Lines and Local 2 of the International Longshoremen's Association and said contract covers any and all labor problems, together with a method of resolving same. The National Labor Relations Board has full control and jurisdiction of any labor disputes.

4. The Waterfront Commission of the Port of New York does not have any jurisdiction of any labor problems under Statute 32:23-1, et seq. It appears in the Notice of Motion and more particularly paragraph 2 thereof, that it has depended for its jurisdiction in this matter on a report of the New York State Crime Commission, which report was filed prior to the enactment of the Waterfront Commission Statute in New Jersey.

5. There does not exist any accusation or charges setting forth a reason for intermeddling in a purely labor situation. In fact, William P. Sirignano, General Counsel and Hearing Officer in the instant matter, so stated at the hearing.

6. He qualified his refusal to answer stating that he was threatened with a suit, that a labor dispute was in progress, and he felt that any requirements to answer would deprive him and the members of Local 2 of their rights under the 14th Amendment of the United States Constitution and, further, that the Waterfront Commission of the Port of New York has no jurisdiction in the labor problem.

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7. He is not registered or licensed by the Waterfront Commission of the Port of New York and, therefore, in accordance with Paragraph 9 of the Notice of Motion, in which the Commission states that it "desired to determine whether any persons registered and licensed by the Waterfront Commision are participating in such illegal coercion," he does not come under the control of the Waterfront Commission are participating in such illegal coerreference to any jurisdiction of the Port of New York concerning labor and labor representatives as such is to be found in N. J. S. A. 32:23-10, paragraph 12, "To advise and consult with representatives of labor and industry, etc."

8. It is apparent that a labor dispute exists under full control of the United States Government, National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle would lead to the impairment of the existing contractual relationships between labor and management.

The Waterfront Commission contends the subject matter of the present investigation is within its statutory authority. The purpose of the present investigation is to determine whether the work stoppage involved herein constituted an illegal coercion of an employer (American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James A. Markley) and, further, to determine whether any persons registered or licensed by the Waterfront Commission are participating in such illegal coercion.

The Commission relies on N. J. S. A. 32:23-10, General Powers, which provides in part:

In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power:

"(11) To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact."

The Commission cites *Matter of the Application of the Waterfront Commission of New York Harbor to Punish Anthony Marchito for Failure to Obey a Subpoena*, decided May 9, 1960, wherein the Supreme Court, Justice Haydn Proctor, speaking for the Court, held:

"The trial court had before it uncontradicted affidavits showing that the purpose of the Commission's investigation was to ascertain the facts concerning the issuance of local charters by the ILA to criminal elements. Clearly, the fact that known hoodlums and criminals may be exercising influence in the ILA is a matter within the Commission's statutory power 'to make investigations, collect and compile information concerning waterfront practices generally.'"

The Commission further contends the instant investigation is not in any respect proscribed by the National Labor Relations Act for the reasons:

1. The Commission is simply investigating information that it has that the work stoppage constituted a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken in order that it, the Commission, may intelligently act in the premises. In this regard, the Commission cites *ICC* v. *Goodrich Transit Co.*, 224 U. S. 194, 211 (1912), for the proposition that "the requiring of information concerning a business is not regulation of that business."

2. The instant work stoppage was in violation of a no-strike clause contained in a collective bargaining agreement in force between the New York Shipping Association, Inc., and the ILA. The clause provides as follows:

"Part III. Prohibition of Lockouts, Strikes or Work Stoppages.

"During the life of this agreement, the party of the first part agrees there shall be no lockouts or work stoppages by the employers but this shall not be construed to mean a lay-off of employees due to business conditions, and the party of the second part agrees there shall be no strikes or work stoppages by the employees. The right of employees not to cross a bona fide picket line is recognized by the employers."

Thus, the instant work stoppage in violation of the above no-strike clause is outside the protection or purview of the National Labor Relations Act. Citing, *NLRB* v. *Dorsey Trailers*, 179 Federal, 2d 589 (5th Cir. 1950); *NLRB* v. *Columbian Enameling & Stamping Co.*, 96 Federal, 2d 984 (7th Cir. 1938), affirmed on another ground 306 U. S. 292.

And since the instant work stoppage is outside the purview of the National Labor Relations Act, the Commission contends it is cognizable by the state courts or agencies. Citing *Philadelphia Marine Trade Association* v. *ILA*, 382 Pa. 326, 115 Atlantic 2nd 733 (1955); *Parodi Cigar Co. of New York* v. *Gaeta*, 156 N. Y. S. 2nd 282 (Supreme Court Queens 1956).

3. Section 9(b) (3) of the National Labor Relations Act (29 U. S. C. 159 (b) (c)) explicitly provides that the National Labor Relations Board shall not certify as a collective bargaining unit a group which includes guards or watchmen together with other employees. Since the instant

work stoppage of longshoremen and checkers was about the employment of James Markley, a guard or watchman on the pier, it appears for this reason to be outside the purview of the National Labor Relations Act.

In support of this contention the Commission cites *S-M News Co.* v. *Simons,* 279 App. Div. 364, 110 N. Y. S. 2nd 175, 179, where an injunction was issued against a work stoppage to compel the giving of business to a relative of the union president.

The Commission further contends that the threat of civil litigation is no ground for a refusal to answer questions pertaining to the work stoppage here involved. See *Bowles* v. *Bay of New York Co. & Supply Corp.,* 152 Federal 2nd 330 (2nd Circuit 1945) and 8 *Wigmore,* Section 2223 (11) (1940 Ed.).

It is the further contention of the Commission that no privilege exists concerning communication between union and management and/or between union representatives.

The National Labor Relations Act defines the following terms that the Court has considered:

"Strike"—29 U. S. C. A. 142.

"Labor dispute"—29 U. S. C. A. 152

"Involve or grow out of labor dispute.

"A case shall be held to involve or grow out of a labor dispute when the cases involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more em-

ployers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a labor dispute (as defined in this section) of 'persons participating or interested therein' (as defined in this section)."

The foregoing is to be found in 29 U. S. C. A. 113.

I have also considered:

"Unfair labor practice.

"It shall be an unfair labor practice for a labor organization or its agents

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title.

"(4) (D) forcing or requiring any employer to sign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Section 157 of that Act provides:

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) of this title."

The National Labor Relations Board is empowered to prevent any person from engaging in an unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. 28 U. S. C. A. 160.

Article XV of the Waterfront Commission Act, N. J. S. A. 32:23-68, provides:

"Certain rights of employees not limited by compact.

"This compact is not designed and shall not be construed to limit in any way rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

Jurisdiction in matters involving labor disputes and unfair labor practices has been expressly granted to the National Labor Relations Board as embodied in the National Labor Relations Act. On the other hand, jurisdiction granted to the Waterfront Commission by the Waterfront Commission Act is limited. It is subject to rights of employees which have been granted or derived from any other statute or rule of law. The power of the Waterfront Commission is expressly subject to the right of employees to strike.

The determination of whether the National Labor Relations Board has jurisdiction in a particular case can only be made by that Board.

Mr. Justice Frankfurter bears out this fact when speaking for the United States Supreme Court in the case of *San Diego Unions* v. *Garman*, 359 U. S. 236, at page 244, referring to Sections 7 and 8 of the National Labor Relations Act:

"At times it has not been clear whether the particular activity regulated by the states was governed by section 7 or 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."

Further, Mr. Justice Frankfurter says at page 245:

"When the activity is arguably subject to section 7 or 8 of the Act, the state as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Sections 7 and 8 of the National Labor Relations Act discussed by Mr. Justice Frankfurter govern both concerted activities and unfair labor practices. They regulate the vital economic instruments of the strike and picket line and unsettled claims between employers and labor unions.

The authority for the Waterfront Commission to make investigations such as here in question is found in N. J. S. A. 32:23-10, General Powers, which provides in part:

"In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power:

"11) To make investigations, collect and compile information concerning waterfront practices generally within

the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact.

"13) To make annual and other reports to the Governors and Legislature of both States containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in Article I and for the effectuation of the purposes of this compact."

As was above noted, the objectives and purposes of this compact may not be extended to limit rights granted to employees by any other statute or rule of law. N. J. S. A. 32:23-68.

The right to have labor disputes settled by the National Labor Relations Board and the right to have the National Labor Relations Board determine if it has jurisdiction in a particular controversy are rights which this compact may not limit, and it is not being contended here that they have any such rights.

In the present case the Waterfront Commission states it has information that this work stoppage was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken, New Jersey, and, accordingly, as I have already stated, in order to determine whether this work stoppage constituted an illegal coercion of an employer to compel such employer to limit the functions of, or to discharge, a licensed port watchman, the Commission instituted the instant investigation.

See *NLRB* v. *Dorsey Trailers, supra,* and *NLRB* v. *Columbia Enameling and Stamping Co., supra.*

In the *Marchitto* case, *supra,* Mr. Justice Proctor said:

"The Commission's investigative function within its statutory jurisdiction is very like that of a grand jury. It

must not act arbitrarily, or in excess of its jurisdiction, but the scope of its investigations is not to be limited by conjectural forecasts of their probable result."

Further in the same opinion, he said:

"No doubt the interests of men to be free from officious intermeddling call for protection. But we feel that these interests may be adequately protected without a full judicial trial at the threshhold of an investigation into the question whether it will uncover matter which should in the public interest be uncovered. The obligation of a subpoena cannot rest on a trial of the value of the testimony sought. It is enough that the proposed investigation be for a lawfully authorized purpose, and that the proposed witness be claimed to have information that might shed some helpful light."

This investigation is both lawful and authorized.

The Waterfront Commission, of course, further contends the National Labor Relations Board does not have jurisdiction since 29 U. S. C. A., Section 159 (b) (3) explicitly provides the National Labor Relations Board shall not certify as a collective bargaining unit a group which includes guards or watchmen together with other employees.

However, even though the National Labor Relations Board refused to certify the Independent Watchmen's Association, the Board did certify the locals representing the longshoremen and checkers who participated in this work stoppage.

See *S-M News Co.* v. *Simons, supra.*

Therefore, it seems to me, for the reasons above stated, that the Rule to Show Cause has merit and that the Court is constrained to find both Messrs. Murphy and Moody guilty of contempt.

The Court, naturally, if they so desire, will afford an opportunity for these gentlemen to purge themselves of such contempt within a reasonable time.

Mr. Pin: May I interrupt the Court briefly? It is my understanding that the rules provide that on an adjudication of contempt, the Court shall further find whether the contempt is civil or criminal or both, and for the record, may I have your finding?

The Court: Civil.

Judgment of Supreme Court of New Jersey

This cause having been duly argued before this Court by Mr. Robert Wall, counsel for the appellant, William Murphy and Mr. Samuel L. Marciano, counsel for the appellant, Mr. Robert A. Pin, John Moody, Sr., and counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the twenty-second day of May, 1961.

FILED
May 22, 1961
John H. Gildea
Clerk

JOHN H. GILDEA
Clerk of the Supreme Court

Appendix A to Jurisdictional Statement
(Opinions and Judgments Below)

Judgment of Superior Court, New Jersey Law Division

This matter being opened to the Court by Robert A. Pin, Esq., attorney for the Waterfront Commission of New York Harbor, the moving party, in the presence of John Moody, Sr. and Lawrence E. Florio, Esq., attorney for John Moody, Sr., upon the return of an Order of this Court, dated May 20th, 1960, directing said John Moody, Sr. to show cause why he should not be punished pursuant to R.S. 32:23-62 as for a contempt of court for failure without justification to obey a subpoena duly issued by the Waterfront Commission of New York Harbor, an administrative agency, and John Moody, Sr. having appeared before this Court pursuant to such order, and the Court having considered all the evidence and the arguments of counsel for the Waterfront Commission of New York Harbor and counsel for John Moody, Sr. and it appearing to the Court that John Moody, Sr. was duly served with lawful subpoena duly issued by the Waterfront Commission of New York Harbor, an administrative agency, commanding him to appear as a witness and testify before it at its offices at 15 Park Row, in the City of New York, State of New York, on May 18th, 1960 and at any adjourned date thereof, and that said John Moody, Sr., without justification has failed to comply with the commands contained in such subpoena,

It is, on this 20th day of June, 1960, ORDERED AND ADJUDGED that John Moody, Sr. is guilty of the contempt with which he is charged and that the contempt is civil in nature, and

It is further ORDERED AND ADJUDGED that upon such adjudication of civil contempt that John Moody, Sr. be fined the sum of $50.00 with costs, and that he stand committed and remain in close custody in the Hudson County Jail,

until the subpoena is obeyed and performed and until such fine as herein imposed for his contempt in accordance with N. J. S. 2A:10-5 with costs is fully paid or until the further order of the Court.

s/ JOSEPH L. SMITH

J. S. C.

Appendix B to Jurisdictional Statement

(See also statutes quoted at pp. 4-5 of Jurisdictional Statement, *supra.*)

(Statutes Involved)

N.J.S.A. 32:23-6 [*McKinneys' Unconsol. Laws*, §6700bb]

> "'Port watchman' shall include any watchman, gateman, roundsman, detective, guard, guardian or protector of property employed by the operator of any pier or other waterfront terminal or by a carrier of freight by water to perform services in such capacity on any pier or other water front terminal." (D4a)

N.J.S.A. 32:23-6 [*McKinney's Unconsol. Laws*, §6700bb]

> "'Compact' shall mean this compact and rules or regulations lawfully promulgated thereunder." (D5a)

N.J.S.A. 32:23-85(7) [*McKinney's Unconsol. Laws*, §6700tt-1(7)]

> "'Compact' shall also include any amendments or supplements to the waterfront commission compact to implement the purposes thereof adopted by the action of the legislature of either the state of New York or the state of New Jersey concurred in by the legislature of the other." (D5a) [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-10(12) [*McKinney's Unconsol. Laws*, 6700dd(12)]:

> "* * * the commission shall have power"

* * *

"12. To advise and consult with representatives of labor and industry and with public officials and agencies concerned with the effectuation of the purposes of this compact, upon all matters which the commission may desire, including but not limited to the form and substance of rules and regulations, the administration of the compact, maintenance of the longshoremen's register, and issuance and revocation of licenses;" (D8a)

N.J.S.A. §§32:23-39, 41 [*McKinney's Unconsol. Laws*, §§6700jj]:

"On or after the first day of December, nineteen hundred fifty-three, no person shall act as a port watchman within the port of New York district without first having obtained a license from the commission, and no person shall employ a port watchman who is not so licensed.

* * *

"No such license shall be granted.

* * *

"(d) If the applicant shall be a member of any labor organization which represents longshoremen or pier superintendents or hiring agents; but nothing in this article shall be deemed to prohibit port watchmen from being represented by a labor organization or organizations which do not also represent longshoremen or pier superintendents or hiring agents. The American Federation of Labor, the Congress of Industrial Organization and any other similar federation, congress or other organizations shall not be considered an organization of national or international occupational or industrial labor organizations shall not be

considered an organization which represents longshoremen or pier superintendents or hiring agents within the meaning of this section although one of the federated or constituent labor organizations thereof may represent longshoremen or pier superintendents or hiring agents;" (D28a to D29a)

N.J.S.A. §32:23-63 [*McKinney's Unconsol. Laws*, §6700nn (2)]:

"Any person who, having been sworn or affirmed as a witness in any such hearing, shall wilfully give false testimony or who shall wilfully make or file any false or fraudulent report or statement required by this compact to be made or filed under oath, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both." (D37a)

N.J.S.A. 32:23-68, 69 [*McKinney's Unconsol. Laws*, §6700oo]:

"This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

"This compact is not designed and shall not be construed to limit in any way any rights of longshoremen, hiring agents, pier superintendents or port watchmen or their employers to bargain collectively and agree

upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise, provided that such employees shall be licensed or registered hereunder and such longshoremen and port watchmen shall be hired only through the employment information centers established hereunder and that all other provisions of this compact be observed." (D38a to D39a)

N.J.S.A. 32:23-86(5) [*McKinney's Unconsol. Laws,* §6700tt-2(5)]:

"* * * the Commission shall have power:

* * *

(5) To confer immunity, * * *"

[The foregoing provision is not part of the Compact as consented to by Congress.]

N.J.S.A. 32:23-88 [*McKinney's Unconsol. Laws,* §6700tt-4]:

"Any person who, having been duly sworn or affirmed as a witness in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act, shall wilfully give false testimony shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both." (D38a) [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-89 [*McKinney's Unconsol. Laws,* §6700tt-5]:

"The commission may maintain a civil action on behalf of the state against any person who violates or

attempts or conspires to violate any provision of the compact or who fails, omits or neglects to obey, observe or comply with any order or direction of the commission, to recover a judgment for a money penalty not exceeding five hundred dollars for each and every offense. Every violation of any such provision, order or direction shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct offense. * * *" (D38a) [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

N.J.S.A. 32:23-90 [*McKinney's Unconsol. Laws,* §§6700tt-6]:

"The commission may maintain a civil action against any person to compel compliance with any of the provisions of the compact, or to prevent violations, attempts or conspiracies to violate any such provisions, or interference, attempts or conspiracies to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder, either by mandamus, injunction or action or proceeding in lieu of prerogative writ." (D38a) [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

29 *U.S.C.A.* §§ 141 (b):

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each

other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

29 *U.S.C.A.* §§ 142(2):

"The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

29 *U.S.C.A.* §151:

"Experience has further demonstrated that certain practice by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the pub-

lic in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

29 *U.S.C.A.* §152 (3) (5) (8) (9):

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

* * *

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 158 of this title.

• • •

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

29 *U.S.C.A.* §153 (d):

"(d) There shall be a General Counsel of the Board • • • He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuances of complaints under section 160 of this title, • • •."

29 *U.S.C.A.* §157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 *U.S.C.A.* §158 (b) (1) (A):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title. * * *"

29 *U.S.C.A.* §158 (b) (2):

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquring or retaining membership;"

29 *U.S.C.A.* §158 (b) (4) (ii) (A, B, C, D):

"(b) It shall be an unfair labor practice for a labor organization or its agents—* * *

* * *

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) Forcing or requiring any employer * * * to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person * * * to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employee unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be

construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees peforming such work."

29 *U.S.C.A.* §158(b)(7):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representa-

tion may not appropriately be raised under section 159(c) of this title.

* * *

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

29 *U.S.C.A.* §158(e):

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees * * * to cease doing business with any other person, and any contract or agreement shall be to such extent unenforcible and void: * * * *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

29 *U.S.C.A.* §160 (a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair

labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

29 *U.S.C.A.* §163:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

29 *U.S.C.A.* §164 (c):

"(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided;* That the Board shall not decline to assert jurisdiction over any labor dis-

pute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

R.R. 4:46-5(c) [New Jersey Rule of Court]:

"Where a statute provides that failure of a person to obey a subpoena or order of a public officer or administrative agency or a receiver, to testify, to answer a proper question, or to produce books, papers, documents or tangible things, or that misconduct on the part of a person attending a hearing, shall be punishable by the court in the same manner as like failure or misconduct is punishable in a case pending in the court, the matter shall be brought before the court by motion supported by affidavit stating the circumstances. Upon the motion the court may issue an order to show cause, returnable in not less than 2 nor more than 10 days, requiring the person to show cause before the court why he should not be punished; or the court may issue an attachment. If the court determines that the failure or misconduct above mentioned was without justification, it may punish him as for a contempt of court."

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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 362

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR,
to punish WILLIAM MURPHY for failure to obey a Subpoena.
WILLIAM MURPHY,
Appellant,
v.
THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR,
to punish JOHN MOODY, SR., for failure to obey a Subpoena.
JOHN MOODY, SR.,
Appellant,
v.
THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

MOTION TO DISMISS APPEAL

WILLIAM P. SIRIGNANO,
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Of Counsel:
IRVING MALCHMAN

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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 362

In the Matter of the Application
of
WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena,

WILLIAM MURPHY,
Appellant,

v.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

In the Matter of the Application
of
WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR., for failure to obey a Subpoena,

JOHN MOODY, SR.,
Appellant,

v.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

Motion to Dismiss Appeal

Appellee, the Waterfront Commission of New York Harbor, respectfully moves that the appeal herein be dismissed

upon the ground that no substantial question respecting the constitutionality of a state statute, as applied, is involved herein.

Statement

This is an appeal from a judgment of the Supreme Court of New Jersey, dated May 22, 1961, affirming a judgment of the Superior Court of New Jersey, dated June 20, 1960, which adjudged the appellants herein (William Murphy and John Moody, Sr.) guilty of civil contempt and which ordered that appellants be fined $50 each and that they be incarcerated until they obey a subpoena of the Waterfront Commission.

The facts are as follows. The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, Markley was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminals of American Export Lines, Inc., in Hoboken.

On Monday, May 16, 1960, when the employment of Markley for American Export Lines commenced as aforesaid, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960.

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage were required to be and are registered by the Waterfront Commission. Also, under the Waterfront Commission Act, Markley, as Chief Security Officer of American Export

Lines, must be and is licensed by the Waterfront Commission as a port watchman.

The Commission instituted the instant investigation seeking to determine whether the purpose of the work stoppage was illegally to coerce an employer (the American Export Lines) to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were violating any provision of the Waterfront Commission Act by participating in such illegal coercion.

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960, on William Murphy, the business agent of Local No. 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and upon John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960.

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions. Murphy testified that he was business agent of Local No. 2, and represented members of his local working at the American Export Piers in Hoboken. He stated that he knew the pier did not work on Monday [May 16, 1960] and that it was common knowledge for the previous ten days that things were not normal at Piers A, B, and C, Hoboken [American Export Lines Piers]. Murphy then refused to answer whether this condition was related to the appointment of Markley as Chief Security Officer and refused to answer any further questions.

The reasons for such refusal to testify, insofar as can be discerned, comprised the following grounds: (1) the work stoppage was a matter which the Commission had no statutory authority to investigate; (2) the work stop-

page was a matter over which the National Labor Relations Board had exclusive jurisdiction; (3) the Commission had no right to investigate the work stoppage since civil litigation may ensue as a result thereof (i.e., the American Export Lines had threatened to sue the ILA); and (4) the Commission's investigation sought to inquire into privileged communications between union and management and/or between union representatives. Neither Moody nor Murphy asserted the privilege against self-incrimination. The last two grounds ((3) and (4)) were abandoned by appellants in the Supreme Court of New Jersey.

Statutes Involved

The Waterfront Commission Act was enacted by the States of New York and New Jersey in 1953 (N. Y. Laws, 1953, c. 882 (McK. Unconsol. Laws 6700aa and following); N. J. Laws 1953, c. 202 (N.J.S.A. 32:23-1 and following)) for the purpose of eliminating racketeering and other various evils on the waterfront in the port of New York Harbor, which had been publicly exposed by various investigative bodies. Since Part I of the Act encompasses the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey, Part I of the Act was submitted to and approved by Congress (Act of August 12, 1953, c. 407, 67 Stat. 541).

Pursuant to the mandate of the Waterfront Commission Compact that it eliminate the evil conditions found to have existed on the waterfront, the Waterfront Commission is clothed with broad investigatory powers. Thus, Article IV of the Waterfront Commission Compact provides:

> "In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:
>
> • • • • • •

"8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * * * * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;

* * * * * *

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in article I and for the effectuation of the purposes of this compact * * *." (McK. Unconsol. Laws 6700dd; N.J.S.A. 32:23-10.)

Witness is defined under Section 5-a(4) of the Act as "* * * any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." (McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85.)

The Waterfront Commission Compact (Art. XIV, Sec. 1) specifically provides that the failure to obey a subpoena of the Commission is punishable as a contempt of court, as follows:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending." (McK. Unconsol. Laws 6700nn: N.J.S.A. 32:23-62.)

ARGUMENT

POINT I

The appeal should be dismissed because no substantial question respecting the constitutionality of a state statute, as applied, is involved herein.

A. Appellants' Federal Preemption Claim.

1. Appellants purportedly bring the instant appeal pursuant to the provisions of 28 U.S.C. § 1257(2) upon the ground that certain provisions of the Waterfront Commission Act relating to the Commission's investigatory powers, as construed and applied by the court below, is in conflict with the National Labor Relations Act, apparently because the work stoppage herein might have involved an unfair labor practice over which it is claimed only the National Labor Relations Board would have jurisdiction (Jurisdictional Statement, pp. 4-6).

In order to sustain an appeal to this Court under 28 U.S.C. § 1257(2), appellant is required to make "explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Rohr Aircraft Corp.* v. *County of San Diego,* 362 U. S. 628, 629. Thus, for example, the "decisions [of this Court] have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities will not sustain an appeal." *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 650. Here, appellants contended in the courts below only that the Commission's *investigation* as such, and not that the application of any particular provisions of the Waterfront Commission Act, was invalid as being in conflict with the National Labor Relations Act. (See appellants' brief in the court below.) Consequently, under well-established principles, no appeal lies under 28 U.S.C. § 1257(2).

Indeed, appellants belated contention respecting the allegedly unconstitutional application of certain provisions of the Waterfront Commission Act was not even asserted by appellants in a timely manner in this Court. For in their notice of appeal to this Court, appellants again object to the constitutionality of the Commission's *investigation* as such, rather than to the application of any particular provisions of the Waterfront Commission Act. Appellants thus state in their Notice of Appeal (pp. 4-5), insofar as here material, the following:

> "The following questions are presented:
>
> 1. Do the pre-emptive effects of 29 U.S.C.A. §§ 157, 158 (LMRA) operate upon the subject matter of this case so as to deprive the Waterfront Commission of New York Harbor of the jurisdiction and authority asserted by it in its subpoenas addressed to the appellants, in its interrogation of the appellants, and in its contempt proceedings against the appellants in the Court of New Jersey?"
>
> • • •

Appellants failure to specify in their notice of appeal the allegedly unconstitutional application by the court below of any particular provision of the Waterfront Commission Act as being one of the questions involved herein is sufficient, without more, to bar the instant appeal. Cf. *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 597, at footnote 14 (on appeal from state court, Supreme Court would not consider questions not preserved in jurisdictional statement); Supreme Court Rule 23(1)(c) (only questions presented in petition for certiorari will be considered by Supreme Court).

2. Appellants belatedly contend in their Jurisdictional Statement (pp. 4-6) that the provisions of the Waterfront Commission Compact empowering the Commission to conduct investigations and, further, making the failure to

obey a subpoena of the Commission punishable as a contempt of court have been so construed and applied by the court below as to be in conflict with the National Labor Relations Act. However, since the Compact has been approved by Congress, the claim of a conflict between the Compact and the National Labor Relations Act is untenable by hypothesis. Cf. *DeVeau* v. *Braisted,* 363 U. S. 144, 153, wherein it was said respecting Section 8 of the Waterfront Commission Act: "Had § 8 been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption". The most that appellants can claim is that the within investigation was *ultra vires* the statutory authorization of the Compact, which is not of course an appealable question under 28 U.S.C. § 1257(2).

The only other provision of the Waterfront Commission Act referred to by appellants in the Jurisdictional Statement (pp. 4-6) is Section 5-a(4) which defines the term "witness" (*supra,* p. 5). Section 5-a(4) was not part of the original Compact but instead was subsequently enacted by the States of New York and New Jersey pursuant to the following provisions of Article XVI, Section I of the Compact:

> "Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the legislatures of either state concurred in by the legislatures of the other." (McK. Unconsol. Laws 6700pp; N.J.S.A. 32:23-70.)

First, insofar as 28 U.S.C. § 1257(2) is concerned, it is apparent that the constitutional validity of Section 5-a(4) (defining "witness") is no more drawn into question by the instant investigation than is Article III, Section 1 of the Compact creating the Commission in the first instance. Appellants' objection to the instant investigation goes to the question of the subject matter or scope of the investigation (as to which Section 5-a(4) is entirely extraneous)

rather than to the question of amenability to subpoena as such. And the scope of the Commission's investigatory power is defined by Article IV of the Compact which has been approved by Congress (*supra*, pp. 4-5) (e.g., Article IV, Section 11, empowering the Commission "to make investigations, collect and compile information concerning waterfront practices generally").

Further, the purpose of Section 5-a(4) was simply to obviate the objection "that registrants and licensees whose conduct is under investigation are not subject to Commission process" (Legislative Memorandum of Waterfront Commission, McKinney's 1957 Session Laws of New York, p. 2052) and neither of the appellants herein is a registrant or licensee. In other words, appellants plainly were subject to subpoena under the investigatory provisions of Article IV of the Compact even without reference to Section 5-a(4). Finally, there can, in any event, be no reasonable doubt that Section 5-a(4) is within the scope of Article XVI, Section 1 of the Compact (*supra*, p. 8) and thus within the Congressional consent to amendments and supplements to the Compact implementing the purposes thereof. Cf. *DeVeau* v. *Braisted, supra.*

B. Appellants' Due Process Claim.

1. Appellants claim here that they were not apprised of the purpose of the Commission's investigation until the Commission filed its papers in the Superior Court of New Jersey to have appellants adjudged guilty of civil contempt and that, therefore, the within civil contempt adjudication is violative of due process. No such claim was made by appellants in the courts below. (See appellants' brief in the court below; also the Jurisdictional Statement, p. 19a.) This explains why the Supreme Court of New Jersey in its lengthy and careful opinion herein did not even discuss such claim (Jurisdictional Statement, pp. 1a-30a). It also explains appellants' contention

(plainly erroneous of course) that their due process claim may properly be raised for the first time before this Court (Jurisdictional Statement, p. 24).

Even as asserted in this Court, appellants' contention is that the Commission's *investigation* as such was violative of due process, and not that any particular provision of the Waterfront Commission Act was so construed and applied as to be violative of due process (Jurisdictional Statement, pp. 7, 24). As noted, this is not a sufficient basis for an appeal under 28 U.S.C. § 1257(2).

2. In any event, appellants' due process contention is plainly without substance. For the fact is that appellants were more than sufficiently apprised by the Commission as to the purpose of the Commission's investigation. Thus, when appellant Moody appeared at the Commission's offices in response to the Commission's subpoena, he was specifically informed as follows (Appellants' printed appendix in the court below, pp. 14a, 22a):

> "JOHN MOODY, SR., residing at 1111 Washington Street, Hoboken, New Jersey, appearing as a witness, having been duly sworn, testified as follows:
>
> By Mr. Piazza:
>
> Q. What is your name and address? A. John Moody, Sr., 1111 Washington Street, Hoboken, New Jersey.
>
> Q. Mr. Moody, you are here pursuant to subpoena; is that correct, sir? A. That's right.
>
> Mr. Florio: Prior to the inception of the interrogation, might I ask, for the benefit of myself and on behalf of my client, what the purpose of the investigation is in order that I may so advise Mr. Moody what his rights are.
>
> Mr. Piazza: Mr. Florio, the purpose of the investigation is to ascertain facts surrounding a work

stoppage at Piers 'A', 'B' and 'C', Hoboken, New Jersey.

Mr. Florio: Yes.

Mr. Piazza: Fair enough?

Mr. Florio: That's good enough.

• • • • • •

By Mr. Sirignano:

Q. Mr. Moody, I understand that you have taken the position that you are not going to answer any questions here; is that correct, sir? A. That's correct.

Q. Do you understand that we are conducting an investigation to determine whether any violations of the Compact are being committed in connection with the present work stoppage at the American Export Lines at Piers A, B and C in Hoboken? You understand that?

Mr. Florio: He has been so advised, Mr. Sirignano."

And appellant Murphy was specifically informed as follows (appendix, pp. 32a, 33a):

"William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Sirignano:

Q. Mr. Murphy—

Judge Wall: Just a minute.

Pardon me, Mr. Sirignano, would you kindly outline the purpose of this meeting?

Mr. Sirignano: Yes.

Judge Wall: For the purpose of the record.

Mr. Sirignano: This is an investigation pursuant to the powers vested in the Commission in the Waterfront Commission Compact, to determine whether there are any violations of the Waterfront

Commission Compact in the pending work stoppage at the Hoboken Piers.

Judge Wall: In a pending work stoppage?

Mr. Sirignano: Yes."

No claim was ever made by appellants before the Commission that they had not been sufficiently informed as to the purposes of the Commission's investigation (Appellants; Jurisdictional Statement, p. 19a). Further, even after the Commission's contempt papers were filed in court, appellants did not claim that they had not been informed by the Commission as to the purposes of the investigation. Rather, they repeated the same grounds for their refusal to testify that they had asserted at the Commission's offices (Appendix, pp. 28a-30a). In addition, by their own argument herein that they were not informed of the purpose of the Commission's investigation until the Commission filed its contempt papers in Superior Court, even appellants concede that at least by that time they had been sufficiently informed respecting the Commission's investigation. On June 17, 1960, the Superior Court, by oral opinion (Jurisdictional Statement, p. 15a), adjudged appellants guilty of civil contempt. However, the Superior Court specifically gave appellants an opportunity to purge themselves of the contempt (Jurisdictional Statement, p. 30a). But appellants persisted in their refusal to testify and, consequently on June 20, 1960, the Superior Court entered its judgment of civil contempt. Accordingly, appellants' contention that the within civil contempt adjudication is violative of due process because they were not informed of the purpose of the Commission's investigation is plainly untenable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant motion to dismiss the appeal herein should be granted.

Respectfully submitted,

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Dated: September 22, 1961.

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